

ESTATE OF MITCHELL ROBERT QUAEMPTS (KUNEKI)

IBIA 76-TQ-2

Decided January 27, 1977

Appeal from Administrative Law Judge's order denying petition for rehearing.

Reversed and Remanded.

1. Indian Probate: Appeal: Matters Considered on Appeal--Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

To apply the doctrine that newly discovered evidence shall not be considered on appeal would be unjust to appellant in this case who by virtue of the lack of findings and conclusions in the Administrative Law Judge's original order was unable to perceive the nature of new evidence required to support a valid petition for rehearing.

2. Indian Probate: Administrative Procedure: Generally--Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

The Administrative Law Judge's order determining heirs failed to satisfy requirements of the Administrative Procedure Act because of the absence of a statement of "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C.A. § 557(c). Under this circumstance, we believe it is appropriate to consider appellant's new evidence on appeal and we conclude that such evidence justifies a rehearing on the issue of decedent's marital status prior to December 16, 1953.

APPEARANCES: Charles C. Flower for appellant, Bessie Snideups Kuneki.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This case is before the Board as an appeal from an Order Denying Petition for Rehearing entered by Administrative Law Judge Robert C. Snashall on June 16, 1976. Appellant is Bessie Snideups Kuneki, mother of Mitchell Kuneki (Quaempts), deceased Yakima unallotted, No. 124-U1457, who died intestate on September 25, 1975.

Subsequent to a probate hearing conducted at Toppenish, Washington, on May 18, 1976, Judge Shashall entered an Order Determining Heirs dated June 10, 1976, which determined the heirs of the decedent and their respective shares in his estate to be as follows: to Mary Ann George Kuneki, decedent's wife, 3/4 of the trust estate; to Bessie Snideups Kuneki, decedent's mother, 1/4 of the trust estate. The estimated value of decedent's estate is over \$32,000.

Decedent's surviving mother, appellant herein, steadfastly denied at the probate hearing that her son was ever married to Mary Ann George Kuneki, or any other woman, by way of ceremony or Indian-custom (Tr. pp. 3, 4). Indian-Custom marriages have been prohibited by the Yakima Indian Nation since December 16, 1953.

Appellant, age 81, appeared at the hearing without counsel, as did Mary Ann George Kuneki, appellee. Contrary to existing policy, the Notice of Hearing to Determine Heirs or Probate Will issued by Judge Snashall to interested parties failed to advise them of their right to be represented by counsel at the hearing, nor does the record reflect that this right was conveyed to them at any stage of the proceedings.

In behalf of her claim that Mary Ann George Kuneki was not married to decedent, appellant presented Judge Snashall with affidavits of friends or relatives which were received into evidence. Exhibit 1, Affidavit of Mozart C. Burles, dated May 14, 1976, states Mary Ann George "was never at any time married under any circumstances to Mitchell Kuneki." Exhibits 4 and 5, affidavits of Elsie Thomas and Nettie J. Kuneki, respectively, state that Mary Ann George did not live with decedent during the last 3 years of his life.

Decedent's surviving brother, John Kuneki, was present at the hearing. Although sworn testimony was not taken from him, John Kuneki interjected at the hearing several times that there was no marriage between decedent and Mary Ann George (Tr. pp. 4, 9).

After noting that Mary Ann George Kuneki was not in attendance at the hearing (she arrived late), Judge Shashall announced: "Well, in view of the testimony that has been given here, I'm going to have to hold based upon this record here that there was no marriage between Mary Ann George and the decedent" (Tr. p. 9).

Mary Ann George Kuneki then arrived at the hearing. She was questioned by Judge Snashall regarding her relationship with decedent as follows:

Q. * * * Now do you contend in any way that you were married to him?

A. I stayed with him for 26 years.

Q Well were you ever married to him?

A. Not really.

Q. Were you with him all the time during that 26 years?

A. No I was not.

Q. You and he lived off and on is that right?

A. That's right.

Q. Are you making any claim here as his wife?

A. I wouldn't be here if you never sent me the letter.

* * * * *

Q. . . . Now you are aware are you not that prior to 1953 that you could have entered into a marriage with him without any formal ceremony merely by living with him Indian custom as husband and wife? Were you aware of that?

A. Yes.

Q. Was it your intention to live with him in that way?

A. I stayed with him.

Q. Well that isn't what I asked you. Was it your intention and his intention to live together as man and wife?

A. We did.

Q. You did live together as man and wife?

A. Yes.

Q. But then you separated didn't you?

A. Uh huh until he got sick and then his mother and his brother kicked him out of the house and we had to stay with my sister.

Q. Well alright.

A. Until he started getting sick again and then he went home.

(Tr. 9-12)

There was no cross-examination of the above testimony. Appellee was asked no questions regarding the paternity of a child which decedent's mother previously testified was conceived by Mary Ann George Kuneki and a man other than decedent (Tr. p. 3).

Mr. Lawrence Goudy, former Chief of Police at the Toppenish Indian Reservation, testified in behalf of Mary Ann George Kuneki. In general terms he stated that he had known the decedent and Mary Ann George all of his life (Tr. p. 12); that as far as he knew they always lived together (Tr. p. 12); that ever since the decedent was postmaster at Celilo Falls, Mary Ann George and the decedent lived together as man and wife (Tr. pp. 12-13); that he first knew about their association when he was a policeman and the decedent was postmaster "18 or 20 years ago" (Tr. p. 14); that Mary Ann was still with him when he came out of the service (Tr. p. 14); and that to his knowledge Mary Ann George and the decedent lived together as man and wife prior to 1953 (Tr. p. 14). There was no cross-examination of Mr. Goudy.

Despite some inconsistencies in the above testimony, we do not deny that the net effect of Mr. Goudy's appearance seems supportive of a finding that the decedent and appellee entered into an Indian-custom marriage prior to 1953.

It is not known from Judge Snashall's June 10, 1976 Order Determining Heirs what evidence or theory was relied upon in determining appellee to be decedent's wife because the form order cites none. As lawyers trained in this subject area we know that the order must have been based on the conclusion of the Administrative Law Judge that the preponderance of the evidence supported a finding that decedent and appellee lived together as husband and wife at a time when Indian-custom marriages could legally be consummated and that subsequent to December 16, 1953, dissolution of

such marriage could not be accomplished by mere separation of the parties. We are also aware that although there was conflicting evidence of an Indian-custom marriage presented at the hearing there is a strong public policy favoring marriage which advises that a marriage should be presumed valid unless disproved and that this presumption extends to marriage by Indian custom. Chancey v. Whinnery, 47 Okl. 272, 147 P. 1036 (1915); Estate of Johnnie Holmes, 4 IBIA 175, 182, 82 I.D. 531 (1975).

But for an aggrieved party unskilled in law who has contested a material issue at a hearing, it is difficult to imagine how a petition for rehearing permitted by agency rules could be drafted when the order against you consists of a one sentence finding. If assisted by counsel, which decedent's mother was not at such time, the task would clearly have been less difficult, but even qualified counsel would stand severely disadvantaged by such an order.

Appellant's petition for rehearing, prepared 4 days after entry of the order determining heirs, reflects her lack of understanding of the Administrative Law Judge's order and applicable law. She asserts only that her deceased son and Mary Ann George did not live together for the past 3 years, that Mary Ann George was living with another man the past 3 years and that Mary Ann George refused to care for decedent during his illness.

In denying appellant's petition for rehearing Judge Snashall discusses the evidence adduced at the hearing, characterizing it as "uncontested," explains the legal basis for his original holding, and also instructs that even if the facts alleged in the petition are true, they do not afford legal grounds in support of a petition for rehearing.

Equipped with the basis of the Administrative Law Judge's original order as explained in his June 16, 1976 Order Denying Petition for Rehearing, appellant submitted a timely notice of appeal which was filed with the Board on June 28, 1976. The notice of appeal discusses newly discovered evidence which seriously questions the correctness of the original finding of a marriage. For example, attached to the notice is an alleged copy of appellee's application for enrollment in the Yakima Tribe, dated January 5, 1954, in which appellee identifies herself as unmarried and signs her name as only Mary Ann George. In addition, reference is made to an application for tribal enrollment for appellee's daughter, Anna Marie Tkumsur, which is also attached to the notice of appeal. This document reflects Anna Marie Tkumsur was born April 7, 1954, and that her father is Wesley R. Tkumsur. Appellee's signature appears on this document, dated July 23, 1954, as Mary Ann Kuneki, although she indicates her marital status as single.

Appellee's use of the name Mary Ann Kuneki, in July 1954, and Mary Ann George in January 1954, on the above documents is consistent with the proposed testimony of Norma Smith, attached to the notice of appeal in affidavit form. A granddaughter of appellant, Norma Smith states that Mary Ann George did not live with Mitchell Kuneki until after her daughter was born in April 1954.

On August 2, 1976, appellant became represented by counsel in this appeal. Appellant's brief, filed by counsel on September 20, 1976, refers to other acquired new evidence such as decedent's own application for tribal enrollment dated July 30, 1948, and his discharge papers from the Army, dated January 29, 1946, which indicate decedent was single at those times.

[1] Precedent of long standing directs that newly discovered evidence shall be presented in support of a petition for rehearing and will not be considered on an appeal. Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975). However, to apply the above doctrine to this appeal would be unjust to appellant who by virtue of the lack of findings and conclusions in the Administrative Law Judge's original order was unable to perceive the nature of new evidence required to support a valid petition for rehearing.

[2] Judge Snashall's order of June 10, 1976, clearly failed to satisfy requirements of the Administrative Procedure Act because of the absence of a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C.A. § 557(c). Under this circumstance, we believe it is appropriate to consider appellant's new evidence on appeal and we conclude that such evidence justifies a rehearing on the issue of decedent's marital status prior to December 16, 1953.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing entered by Administrative Law Judge Robert C. Snashall on June 16, 1976, be, and the same is hereby REVERSED.

Accordingly, IT IS HEREBY FURTHER ORDERED that this case be, and the same is hereby REMANDED for an additional hearing on the issue of decedent's marital status prior to December 16, 1953.

Done at Arlington, Virginia.

Wm. Philip Horton
Administrative Judge

We concur:

Alexander H. Wilson
Chief Administrative Judge

Mitchell J. Sabagh
Administrative Judge